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Supreme Court, U.S.
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No. 99-1786

IN THE

Supreme Court of the United States

GREAT-WEST LIFE & ANNUITY INSURANCE COMPANY, EARTH SYSTEMS, INC. and THE HEALTH AND WELFARE PLAN FOR EMPLOYEES AND DEPENDENTS OF EARTH SYSTEMS, INC.,

Petitioners,

v.

JANETTE KNUDSON and ERIC KNUDSON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION TO DISMISS AS IMPROVIDENTLY GRANTED

JEFFREY S. POP
JEFFREY S. POP & ASSOCIATES
A LAW CORPORATION
9107 Wilshire Boulevard
Suite 600
Beverly Hills, CA 90210
(310) 273-5462

Attorneys for Respondent Janette Knudson

165405

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

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PURPOSE OF MOTION TO DISMISS

Defendant/Respondent Janette Knudson ("Knudson") brings this motion to dismiss on grounds that certiorari was improvidently granted because there is no case or controversy. All parties to this case agree that a claim for reimbursement of medical benefits paid pursuant to a healthcare plan is governed by the Employee Retirement Income Security Act, 29 U.S.C. § 1001, et seq. ("ERISA"), and not by state contract law. (Pet. App. C-5.)[1] In applying ERISA to the interpretation of the healthcare plan, the district court found for Knudson.[2] (Pet. App. C-12.)

STATEMENT OF THE CASE

Plaintiff/Petitioner Great West ("Petitioner") filed an action under ERISA in order to obtain a judicial determination of the plan's rights and Knudson's duties with respect to the reimbursement clauses of the Earth Systems ERISA Plan. (Appellant's ER, Doc. 5, Nos. 1-4, First Am. Compl. ¶¶ 5, 10.) Knudson did not challenge the applicability of ERISA, but rather claimed that Petitioner waived its rights by failing to follow the district court's ruling to attend a

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1. "Pet." refers to the Petition for Writ of Certiorari. "Pet. App." refers to the Appendix in the Pet. "Resp. App." refers to the Appendix in Brief in Opposition for Respondent Janette Knudson. "ER" refers to the Excerpts of Records filed with the Ninth Circuit. "Doc." refers to the docket number used in the ER. "No." or "Nos." refers to the page number(s) of the document.

2. The issue of lack of subject matter jurisdiction was not raised, adopted or argued by Knudson. The choice of law issue is not in dispute since federal law was applied by the district court in the underlying case.

hearing wherein the reimbursement lien was adjudicated pursuant to ERISA. (Appellee's ER, Doc. 13, Nos. 6-12, Answer to First Am. Compl.)

The district court granted Knudson's summary judgment motion, holding that as a matter of law Petitioner's interpretation of the ERISA plan was arbitrary and capricious. (Pet. App. C-9.) Petitioner appealed to the Ninth Circuit. (Pet. 2.)

On appeal, Petitioner for the first time interjected the issue whether a claim for reimbursement pursuant to an ERISA plan may be brought under ERISA. (Knudson's Ninth Circuit Answering Brief, pgs. 39-46.) Petitioner argued that ERISA was applicable to a claim for reimbursement. (Petitioner's Ninth Circuit Opening Brief, pg. 16, Issue No. 1.) Knudson agreed that ERISA and ERISA case law were applicable and advised the Ninth Circuit that there was "no case or controversy" between the parties on this issue. (Knudson's Ninth Circuit Answering Brief, pgs. 40-41.) However, the Ninth Circuit's unpublished opinion found no ERISA jurisdiction, but nevertheless affirmed the district court's ruling on the merits. (Pet. App. A-4.)

Petitioner then sought a writ of certiorari for the issue whether enforcing a recoupment of benefits is within the meaning of compensatory damages as set forth in *Mertens v. Hewitt Assoc.*, 508 U.S. 248 (1993). (Pet. I.) On January 22, 2001, this Court granted certiorari. __ U.S. __, 121 S. Ct. 876, 2001 U.S. LEXIS 945.

Subsequent to this Court's grant of the writ of certiorari, Knudson learned that the Solicitor General's Office would not have advised the granting of certiorari had it realized

that all Petitioners, all amicus curiae and Knudson would all argue in favor of applying ERISA law to a claim for reimbursement and none would argue against it.

ARGUMENT

I.

THIS COURT LACKS THE POWER TO HEAR THIS CASE BECAUSE THERE IS NO CASE OR CONTROVERSY BETWEEN PETITIONER AND KNUDSON ON THE APPLICABILITY OF ERISA.

A. The Constitution Requires A Bona Fide Case and Controversy Which Does Not Exist in this Case.

Article III, section 2 of the United States Constitution requires there be a case and controversy. Without a controversy between opposing parties, there is no jurisdiction to hear the issue. U.S. Const., art. III, § 2. This threshold issue must first be determined before this Court can address the question presented. As Justice Stone states in *Nashville, Chattanooga & St. Louis R.R. Co. v. Wallace, Comptroller of the Treasury of Tenn.*, 288 U.S. 249, 263 (1932):

> This preliminary question . . . must first be considered, for the judicial power with which this Court is invested by Art. 3, § 1 of the Constitution, extends by Art. 3, § 2, only to "cases" and "controversies"; if no "case" or "controversy" is presented for decision, we are without power to review the decree of the court below.

Id., citing *Muskrat v. United States*, 219 U.S. 346 (1911). Thus, "the exercise of judicial power under Art. III of the Constitution depends upon the existence of a case or controversy." *Preiser, Commissioner of Correctional Services of New York v. Newkirk*, 422 U.S. 395, 401 (1975).

B. There Is No Case Or Controversy Between Petitioner and Knudson.

Here, because Petitioner and Knudson have always agreed that a claim for reimbursement is covered by ERISA, and that ERISA preempts substantive state law regarding plan interpretation there is no case or controversy between the parties on this issue. (Pet. App. C-5.) The procedural history reveals this fact. Petitioner filed a complaint under ERISA. Knudson answered. The district court applied ERISA law in interpreting the plan's reimbursement provision and found Petitioner's interpretation of the plan was arbitrary and capricious. The district court granted summary judgment in favor of Knudson, and awarded fees and costs against Petitioner pursuant to ERISA.

Petitioner on appeal only then interjected the *FMC Medical Plan v. Owens*, 122 F.3d 1258 (9th Cir. 1997) case which was not properly raised below. Knudson objected. (Knudson's Ninth Circuit Answering Brief, pgs. 39-46.) It was Petitioner who filed the complaint *under* ERISA, and it was Petitioner and Knudson who *argued for* the applicability of ERISA at the district court level. The district court applied ERISA in its ruling. There is no factual or legal basis for Petitioner to challenge the holding in *FMC* which has nothing to do with this case, because here, the district court applied ERISA. The Ninth Circuit affirmed the district court's judgment on the merits even though dismissal could

have been based upon the lack of subject matter jurisdiction. (Pet. App. A-4 n.5.) There is no case or controversy presented. In fact the district court's ruling was affirmed. (Pet. App. A-4.)

C. Knudson Will Not Argue Against Her Own Interests.

Knudson will not argue for a position which is contrary to her own interests. Knudson obtained a summary judgment motion and attorney fees by applying ERISA law correctly. In the same case she will not argue against her own interests and undermine her victory. Knudson cannot be forced to take a position which would destroy the jurisdictional basis of her district court victory. Further, her attorneys would face a conflict of interest for recognizing the plan's recovery right under ERISA law and by paying the adjudicated lien rights to the plan.

This case does not provide the foundational basis for adjudicating the apparent subject matter jurisdictional split between the Ninth Circuit and the other circuits. The issue was not litigated in the underlying case. This is not the case of a so called "double recovery" by a plaintiff or the case where the plan beneficiary failed to notice the plan administrator before adjudicating the amount of payment to the plan utilizing federal ERISA law.

D. The Law Forbids a Party to Feign a Position In Order to Obtain an Advisory Opinion.

The law does not allow Knudson to create a **collusive case**[3] wherein she argues a position in order to obtain an

3. *See Poe v. Ullman*, 367 U.S. 497, 504 (1961) (collusive suits as meaning actions where there is a want of truly adversary contest with respect to the issue); *see also Cleveland v. Chamberlain*, 66 U.S. 419, 425-26 (1861); *Wood-Paper Co. v. Heft*, 75 U.S. 333, 336 (1868).

advisory opinion. *South Springs Hill Gold Mining Co. v. Amador Medean Gold Mining Co.*, 145 U.S. 300, 301-02 (1892) ("We assumed that this is not an agreed case gotten up by collusion; but the litigation has ceased to be between adverse parties, and the case therefore falls within the rule applied where the controversy is not a real one.")

A collusive case is when one party pretends to set forth a particular position in order to manufacture a controversy. By this ruse, the parties trick a court into issuing an advisory opinion. *Respondent Knudson will not change her position and argue against ERISA*, in order to make this Court believe that a *bona fide* dispute exists between the parties in this case.[4]

E. Petitioner's Argument That ERISA Law Applies When Interpreting a Plan's Provision Supports Affirming the District Court's Granting of Summary Judgment.

Petitioner now argues in favor of an ERISA cause of action which would result in an affirmation of the district court's determination that Petitioner's interpretation of the ERISA Plan was arbitrary and capricious since the district court in granting summary judgment applied ERISA law to determine that Petitioner acted "arbitrarily and capricious." (Pet. App. C-9 – C-10.) Knudson should not be asked to

4. The facts of this case do not support the issue framed by Petitioner's writ of certiorari. Respondent Knudson's case was affirmed on the merits which applied ERISA law in interpreting the recovery language in the plan document. Therefore, any suggestion that other counsel be appointed to argue the jurisdictional issue invites an advisory opinion from this Court. In short, the foundational basis for the jurisdictional issue is not supported by this case.

switch sides and for the first time argue against the complaint's framing an ERISA cause of action. To do so would be enter into the territory of a collusive action, *i.e.*, a ruse to feign a controversy in order to obtain an advisory opinion.

Petitioners in their letter to the Court Clerk, dated February 13, 2001 failed to note that the Ninth Circuit addressed the merits on appeal and affirmed the judgment of the district court. The case of *Cardinal Chemical Co. v. Morton International Inc.*, 508 U.S. 83 (1993) is not dispositive of the issues presented. First, that case is a patent case where unique rules apply. Second, *Cardinal Chemical Co.* involved three cases with reoccurring issues over a patent.

The present case, *Great-West v. Knudson*, is distinguishable in that the *Knudson* district court applied ERISA law in interpreting the plan unlike the courts in *Cement Masons v. Stone*, 197 F.3d 1003 (9th Cir. 1999), *pet. for cert. pending*; *Reynolds Metals Co. v. Ellis*, 202 F.3d 1246 (9th Cir. 1999), *cert. denied*, __ U.S. __ (2001) and *FMC Med. Plan v. Owens*, 122 F.3d 1258 (9th Cir. 1997). Further, as noted above, Respondent Knudson prevailed on the merits.

Simply, the instant case does not provide a foundation to resolve the conflict between the circuits. It has no precedential value. Therefore, the suggestion of appointment of counsel to argue on behalf of the Ninth Circuit, or amicus counsel to argue in favor of the holding in *FMC v. Owens* is inappropriate. Simply, there is no case or controversy based upon the facts before this Court.

F. This Case Is Not One Where the Parties Failed to Brief or Argue a Dispositive Issue.

In *United States Nat'l Bank of Oregon v. Indep. Ins. Agents of America, Inc.*, 508 U.S. 439 (1993), the respondent did not address whether a statute was repealed or not, despite the court's invitation to do so at oral argument. *Id.* at 445-47. Even when the court ordered the respondent to file supplemental brief on the validity of the statute, the respondent did not take a position on the merits. *Id.* This Court in holding that the Court of Appeals was within its authority to consider the validity of the statute, stated that "a court may consider an issue 'antecedent to . . . and ultimately dispositive of' the dispute before it, even an issue the parties fail to identify and brief." *Id.* at 447, citing *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990). Nevertheless, the foregoing is not applicable since: (1) the parties briefed the issue, and (2) the lower court's judgment was affirmed on the merits.

There is a substantial difference between the situation when a party fails to set forth a meritorious argument, such as in the case in *United States Nat'l Bank of Oregon*, and the case where there is no meritable counter-argument. As Knudson explains in detail below, this Court has unequivocally held since *Pilot Life Ins.*, 481 U.S. 41, that ERISA preempts state law that relate to ERISA plans. In the instant case, there is no *bona fide* argument to the support the position that state contract law overrides ERISA when interpreting the reimbursement clauses.

In the present case, both Petitioner and Knudson are of the position that Petitioner's complaint framed an ERISA cause of action. Knudson further contends that the district

court correctly applied ERISA law in granting her summary judgment motion. Petitioner disagrees, but that issue is not before this Court.

Had Petitioner argued in the Ninth Circuit that its complaint had framed no issue under ERISA in an attempt to evade the district court's adverse ERISA ruling, then a controversy on this issue would exist. Since Petitioner argued *in favor of* an ERISA cause of action, no controversy between Petitioner and Knudson exists. Before the Court of Appeals for the Ninth Circuit, Knudson made her position clear by showing there was no "case or controversy" and by arguing the real ERISA issue on appeal, *i.e.*, whether the district court correctly held that Petitioner's interpretation of the plan was "arbitrary and capricious." (Knudson's Ninth Circuit Answering Brief, pgs. 9, 40.)

II.

THERE IS NO MERIT TO THE POSITION THAT AN ERISA PLAN MAY NOT APPLY ERISA LAW IN ORDER TO DETERMINE WHETHER A PARTICIPANT SHOULD REIMBURSE SOME OR ALL OF THE FUNDS.

A. ERISA Requires Uniformity of Law.

ERISA is a comprehensive scheme which requires uniformity in its interpretation. *Pilot Life Ins. v. Dedeaux*, 481 U.S. 41, 52-53 (1987). Common law causes of action such as breach of contract are preempted by ERISA. *Id.* ERISA requires a civil enforcement scheme which is essential for accomplishing the stated purposes of ERISA. *Id.*

> In sum, the detailed provisions of 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA.

Id. at 54.

If an ERISA plan or its insurer filed in state court utilizing state contract law to adjudicate its rights under the reimbursement provisions of its ERISA plan, then "the federal scheme would be completely undermined." *Id.* at 52-54. On the other hand, the ERISA plan or the beneficiary can file in state court so long as ERISA law is applied in interpreting the language of the plan.[5]

In order to determine whether a participant owes reimbursement under an ERISA plan a court must *interpret the terms of the ERISA plan*. State laws cannot be used to interpret the provisions of an ERISA plan. *Pilot Life Ins.*, 481 U.S. at 52-53.

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5. It should be noted that nothing in *Pilot Life Ins. Co.*, 481 U.S. 41 *or Met. Life Ins. Co.*, 481 U.S. 58 addresses the issue of state courts' applying ERISA law. In fact, 29 U.S.C. § 1132 expressly provides for **concurrent state** court and federal court **forum** jurisdiction to apply ERISA. The proper forum issue is not involved in this case.

B. If ERISA Law Does Not Preempt, Then States Could Enact Statutes Governing Reimbursement Provisions of ERISA.

The Ninth Circuit's view opens the way for each state to enact its own scheme how to construe a plan's reimbursement provisions. It would be ludicrous to hold that when a plan participant wants to clarify his reimbursement obligation under 29 U.S.C. § 1132(a)(1)(B), he has to file under ERISA, but when the plan wants to adjudicate those same rights, it has to file under some state contractual law. This situation cannot exist as states are not allowed to pass legislation which relates to ERISA Plans. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 62-63 (1987).

C. An Award Of Money Does Not Nullify ERISA.

The idea that a claim for reimbursement is somehow transformed into an at law action for damages merely because the lawsuit might result in the participant's owing money to the ERISA plan is devoid of legal merit. For example, a participant's lawsuit to determine his rights under a plan could result in a plan's having to pay money for a medical procedure. The possible outcome does not mean that the plan participant's lawsuit falls under state law and not under 29 U.S.C. § 1132(a)(1)(B).

D. If ERISA Does Not Apply, Plan Participant Rights Would Be Adjudicated Under ERISA While the Plan's Rights Under The Same Provisions Would Be Adjudicated Under State Contract Law.

The participant has a right to file under 29 U.S.C. § 1132(a)(1)(B) to determine rights under an ERISA plan, arguing that no reimbursement is owed.

The Ninth Circuit apparently agrees that ERISA would apply since the participant is not seeking money damages. Yet, if the plan were to file in order to enforce the plan's interpretation of that same ERISA plan, the case would *not* fall under ERISA. As pointed out above, such a position is not supportable under ERISA. In *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 232 (1995) this Court states:

> In this regard, the ADA contrast markedly with ERISA, which does channel civil actions into federal courts, see ERISA §§ 502(a), (e), 29 U.S.C. §§ 1132(a), (e), . . . *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54, 95 L. Ed. 2d 39, 107 S. Ct. 1587 (1987); see, *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 143-145, 112 L. Ed. 2d 474, 111 S. Ct. 478 (1990) (finding ERISA's comprehensive civil enforcement scheme a "special feature" supporting preemption of common law wrongful discharge claims.)

American Airlines v. Wolens, 513 U.S. at 232.

Congress' intention was to funnel all civil actions which affected the operation of ERISA plans into ERISA's comprehensive scheme.

SUMMARY

No party in this case argued against ERISA being the applicable law. Since the only issue certified before this Court is not in controversy, this Court has no jurisdiction to hear the case. This Court has held that ERISA preempts state law that relate to ERISA plans. State law cannot be used to interpret ERISA plans' reimbursement clauses.

By belatedly raising the present issue on appeal, Petitioner is asking the federal courts to issue what amounts to an advisory opinion. As the Ninth Circuit Court opinion in *Great West v. Knudson* is not published, it has no precedent value. Thus, this case should terminate now by its dismissal.

CONCLUSION

Respondent Janette Knudson respectfully requests that this Court dismiss the appeal on the grounds that there is no case or controversy and that the writ of certiorari was improvidently granted.

Respectfully submitted,

JEFFREY S. POP
JEFFREY S. POP & ASSOCIATES
A LAW CORPORATION
9107 Wilshire Boulevard
Suite 600
Beverly Hills, CA 90210
(310) 273-5462

Attorneys for Respondent
Janette Knudson